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Congress's Power over Court Decisions: Jurisdiction Stripping and the Rule of *Klein*

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Summary

Article III of the Constitution establishes the judicial branch of the federal government, creating a federal judiciary with significant independence, providing federal judges with life tenure, and prohibiting diminutions of judges' salaries. However, the Framers also granted Congress the power to regulate the federal courts in numerous ways.

One key way that Congress can regulate federal courts is by establishing the scope of their jurisdiction. Article III authorizes Congress to determine what types of cases inferior courts have jurisdiction to review. Additionally, Article III's Exceptions Clause grants Congress the power to make "exceptions" and "regulations" to the Supreme Court's appellate jurisdiction. Congress sometimes exercises this power by "stripping" federal courts of jurisdiction to hear certain classes of cases. On occasion, Congress has eliminated a court's jurisdiction to review a particular case during active litigation. More generally, Congress may influence case outcomes by amending the substantive law underlying particular litigation.

These practices have, at times, raised separation-of-powers questions about whether the legislative branch is impermissibly interfering with the judicial power to resolve cases and controversies independently. In *Marbury v. Madison*, the Supreme Court announced that the Constitution, by granting the judicial branch the power to decide cases and controversies, necessarily grants the judiciary the power to "say what the law is." Sometimes competing with this principle is the understanding that the Constitution empowers Congress to decide what classes of cases the federal courts may review and enact substantive law that courts may need to interpret.

This report examines a series of Supreme Court rulings that have considered separation-of-powers-based limitations on the Exceptions Clause, congressional jurisdiction stripping, and the ability of Congress to amend laws with the purpose of directly impacting existing litigation. The Court's jurisprudence in this area largely begins with the Reconstruction-era case *United States v. Klein*, in which the Supreme Court held that Congress may not, by limiting appellate jurisdiction, dictate a "rule of decision" that undermines the independence of the judiciary. In a related 1995 case, *Plaut v. Spendthrift Farm, Inc.*, the Court held that Article III prohibits Congress from enacting legislation requiring courts to reopen final judgments.

Cases since *Klein* have limited the reach of that decision. However, the case remains good law, and *Klein* and its progeny provide some useful guideposts for Congress in fashioning jurisdiction-stripping legislation and measures that target pending litigation. Cases interpreting *Klein* have held that Congress cannot impede the judiciary's power to decide cases independently, for example, by telling a court how it should rule in a specific case or how to apply existing law to the facts in a given case. Within those boundaries, Congress has some ability to influence how the judiciary resolves lawsuits without violating the separation of powers. Congress can do this by regulating federal courts' jurisdiction or by enacting substantive statutes that the judiciary must apply to resolve a legal dispute. For instance, it does not offend separation-of-powers limitations for Congress to create or amend a law that retroactively applies to lawsuits that began before the new law was enacted. Such new law can target a specific case or set of cases. Additionally, it appears legislation can be designed in a manner that ensures victory for a particular party so long as the reviewing court may still independently apply the new law to the facts of the case.

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Article III of the Constitution establishes the judicial branch of the federal government, creating a federal judiciary with significant independence, providing federal judges with life tenure, and prohibiting diminutions of judges' salaries.[1] In presiding over cases, federal courts possess significant power over citizens' life, liberty, and property. Congress, for its part, provides the substantive law that the courts apply in such cases through legislation. In addition to enacting substantive legislation, Congress also has other ways to exert control or influence over the activity of the courts.

One significant way Congress can affect the judiciary is by regulating federal court jurisdiction. The Exceptions Clause in Article III grants Congress the power to make "exceptions" and "regulations" to the Supreme Court's appellate jurisdiction.[2] More generally, as part of its power to create lower federal courts, Congress possesses the power to eliminate the jurisdiction of the lower courts.[3] Congress sometimes exercises this power by "stripping" federal courts of jurisdiction to hear certain classes of cases. Congress has even eliminated a court's jurisdiction to review a particular case while it was pending.[4] More generally, Congress may influence judicial outcomes by amending the substantive law underlying particular litigation.[5]

These practices have, at times, raised separation-of-powers questions about whether the legislative branch is impermissibly interfering with the judicial power to resolve cases and controversies independently.[6] Long ago in *Marbury v. Madison*, the Supreme Court announced that the Constitution, by granting the judicial branch the power to decide "cases" and "controversies," necessarily grants the judiciary the power to "say what the law is."[7] However, the Constitution does not require complete insultation of the judiciary from the legislature.[8] On the one hand, the Court has held that "Congress has the power (within limits) to tell the courts what classes of cases they may decide"[9] and enact legislation that may affect pending cases being adjudicated by the federal courts.[10] On the other hand, the limits of Congress's power to legislate

[1] U.S. CONST. art. III.

[2] *See* U.S. CONST. art. III, § 2.

[3] *See* Sheldon v. Sill, 49 U.S. (1 How.) 441, 449 (1850) ("Courts created by statute can have no jurisdiction but such as the statute confers.").

[4] *See* Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 888–916 (2011) (describing various congressional jurisdiction-stripping efforts).

[5] *See, e.g.*, Robertson v. Seattle Audubon Soc'y, 503 U.S. 429 (1992) (upholding law that replaced legal standards underlying particular litigation).

[6] *See, e.g.*, Bank Markazi v. Peterson, 578 U.S. 212, 246 (2016) (Roberts, C.J., dissenting) ("Applying a retroactive law that says 'Smith wins' to the pending case of *Smith v. Jones* implicates profound issues of separation of powers."); Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 158–59 (1960) (noting concerns if Congress were to have "plenary control over the appellate jurisdiction of the Supreme Court"). *But see* Ralph A. Rossum, *Congress, the Constitution, & the Appellate Jurisdiction of the Supreme Court: The Letter & the Spirit of the Exceptions Clause*, 24 WM. & MARY L. REV. 385, 413–19 (1983) (dismissing arguments that the Exceptions Clause is limited by separation of powers, noting, "In our constitutional system, the judiciary is not supposed to be entirely independent "and that "[s]eparation of powers does not entail complete independence").

[7] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *see also* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218–19 (1995) ("[T]he Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy.").

[8] *See generally* CRS Report R47382, *Congressional Control over the Supreme Court*, by Joanna R. Lampe.

[9] City of Arlington, Tex. v. FCC, 133 S. Ct. 1863, 1868 (2013).

[10] *Plaut*, 514 U.S. at 226 ("When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly.").

may be tested when Congress enacts laws that interfere with functions of the other branches or target specific individuals or cases, as opposed to legislating for the country as a whole and the general welfare.[11]

This report examines a series of Supreme Court rulings that have considered separation-of-powers-based limitations on the Exceptions Clause, congressional jurisdiction stripping, and the ability of Congress to amend laws with the purpose of directly impacting existing litigation.[12] The Court's jurisprudence in this area largely begins with the Reconstruction-era case *United States v. Klein*.[13] In *Klein*, the Supreme Court generally held that Congress may not, by limiting appellate jurisdiction, dictate a "rule of decision" that undermines the independence of the judiciary.[14] In a related 1995 case, *Plaut v. Spendthrift Farm, Inc.*, the Court held that Article III prohibits Congress from enacting legislation requiring courts to reopen final judgments.[15]

These principles are not without limits. Other Supreme Court decisions since *Klein* have allowed Congress to enact legislation stripping federal courts of jurisdiction. For example, the Supreme Court upheld a jurisdiction-stripping provision in 2018 in *Patchak v. Zinke*.[16] Although no opinion in *Patchak* gained the support of a majority of the Court, Justice Thomas's plurality opinion summarized *Klein* and its progeny as creating the following rule: "Congress violates Article III when it compels findings or results under old law. But Congress does not violate Article III when it changes the law."[17] The most recent Supreme Court decision on this issue, a 2023 non-merits order in *Mountain Valley Pipeline, LLC v. Wilderness Society*, provided little additional clarity.[18]

After surveying the major cases on congressional control over court decisions, this report concludes by analyzing certain remaining open questions in this area and providing general guidance for crafting jurisdiction-stripping legislation or other measures designed to impact pending litigation.

The Separation of Legislative and Judicial Powers

The Constitution does not explicitly mention "separation of powers," but it is generally considered inherent in the Constitution's allocation of federal power to the executive, legislative, and judicial branches that each branch of government has discrete powers that no other branch

[11] *See* INS v. Chadha, 462 U.S. 919, 966 (1983) (Powell, J., concurring) ("The only effective constraint on Congress' power is political, but Congress is most accountable politically when it prescribes rules of general applicability. When it decides rights of specific persons, those rights are subject to 'the tyranny of a shifting majority.'"); Fletcher v. Peck, 10 U.S. (1 Cranch) 87, 136 (1810) ("It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules would seem to be the duty of other departments.").

[12] Jurisdiction stripping can raise other constitutional questions that are not relevant to the issues raised by *Klein* and its progeny, such as other internal Article III constraints and external constraints imposed by other provisions within the Constitution. *See generally* RICHARD H. FALLON, JR., ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 295–345 (Robert C. Clark, et al. eds., 7th ed. 2015). This report is focused on the *Klein*-based limits on jurisdiction stripping. Other limits on the power of Congress concerning the control of federal court jurisdiction are beyond the scope of this report.

[13] United States v. Klein, 80 U.S. 128 (1872).

[14] *Id.*

[15] *Plaut*, 514 U.S. 211.

[16] Patchak v. Zinke, 583 U.S. 244 (2018).

[17] *Id.* at 250 (internal citations, quotation marks, and alterations omitted).

[18] Mountain Valley Pipeline, LLC v. Wilderness Soc'y, 144 S. Ct. 42 (2023) (Mem).

can invade.[19] The Founders envisioned the separation of the three branches of government as an "essential precaution in favor of liberty."[20] In particular, the Framers viewed the need to separate the legislative and judicial powers as a "sharp necessity."[21] This was, in part, a reaction to a common practice in the colonies, and then the states, of "legislative correction of judgments," in which legislative bodies would set aside judgments through legislation.[22]

Still, the Framers recognized that separation of the three branches of government would not be perfect or complete.[23] This is evinced in the powers granted to Congress in Article III of the Constitution. For example, Article III's Exceptions Clause allows Congress to make exceptions to the Supreme Court's appellate jurisdiction.[24] The clause has traditionally been viewed as authorizing Congress to remove a class of cases from federal court jurisdiction.[25] Moreover, because Article III grants Congress the power to establish inferior federal courts,[26] those lower courts have only the jurisdiction that Congress affirmatively grants by statute.[27]

In addition, Congress's power to regulate federal court jurisdiction and to enact substantive laws that the judiciary must apply extends to laws that retroactively change legal rights. The Supreme Court has long recognized that courts must generally apply retroactive laws to pending cases, even when the law was different when the litigation began.[28] Thus, Congress "can always revise the judgments of Article III courts in one sense: When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly."[29] Similarly, Congress can lawfully influence litigation by enacting legislation that alters the effect, going forward, of injunctions issued by a federal court.[30]

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[19] *See, e.g.*, Miller v. French, 530 U.S. 327, 341 (2000) ("The Constitution enumerates and separates the powers of the three branches of Government in Article I, II, and III, and it is this 'very structure' of the Constitution that exemplifies the concept of separation of powers."); Jonathan Turley, *Madisonian Tectonics: How Form Follows Function in Constitutional & Architectural Interpretation,* 83 GEO. WASH. L. REV. 305, 332–33 (2015) ("The separation of powers frames Madison's vision of the tripartite system.... [T]he separation of powers was not mentioned in the text of the Constitution ... [but] the absence of an explicit reference to separation of powers is not surprising when placed in the context of the contemporary views of the time.").

[20] THE FEDERALIST NO. 47 (James Madison).

[21] *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 221 (1995).

[22] *See id.* at 219–20.

[23] *See* THE FEDERALIST NO. 48 (James Madison) ("[T]he degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.").

[24] U.S. CONST. art. III, § 2; *see also Ex parte* McCardle, 74 U.S. (1 Wall.) 506, 512–13 (1868) ("It is quite true ... that the appellate jurisdiction of this court is not derived from acts of Congress. It is, strictly speaking, conferred by the Constitution. But it is conferred 'with such exception and under such regulations as Congress shall make.'").

[25] *See Ex parte McCardle*, 74 U.S. (1 Wall.) at 513–14.

[26] U.S. CONST. art. III, § 1 ("The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.").

[27] *See* Sheldon v. Sill, 49 U.S. (1 How.) 441, 449 (1850) ("Courts created by statute can have no jurisdiction but such as the statute confers.").

[28] *See* United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 109 (1801) ("[I]f subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed."). The Constitution imposes other limits on retroactive legislation, including the Ex Post Facto Clause, the Takings Clause, prohibitions on Bills of Attainder, and the Due Process Clause. *See* Bank Markazi v. Peterson, 578 U.S. 212, 228–29 (2016); Landgraf v. USI Film Prods., 511 U.S. 244, 266–67 (1994); *see also* CRS In Focus IF11293, *Retroactive Legislation: A Primer for Congress*, by Joanna R. Lampe (2019).

[29] *Plaut*, 514 U.S. at 226.

[30] *See id.* at 222; Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1855).

The tension in Article III, which creates an independent federal judiciary but also subjects the judicial branch to some degree of legislative control, generates difficult questions related to separation of powers. The Supreme Court has thus had multiple occasions to consider when Congress's actions impermissibly invade the powers of the judiciary.

United States v. Klein

The Supreme Court first recognized the separation-of-powers limitations on jurisdiction-stripping legislation in the Reconstruction-era case *United States v. Klein*.[31] The plaintiff in *Klein* was the estate of a deceased Confederate soldier whose cotton had been confiscated and sold by the government during the Civil War under the Abandoned and Captured Property Act of 1863.[32] Under that statute, individuals who had not "given any aid and comfort" to the rebellion could obtain the proceeds from any captured property.[33] Several presidential proclamations declared that a person could become eligible to receive the proceeds of his property after receiving a full presidential pardon and taking an oath of loyalty to the United States.[34] Once pardoned, a person could petition the U.S. Court of Claims for the proceeds.[35] The Court of Claims, in a May 1869 ruling, concluded that the soldier's estate was entitled to receive the cotton's proceeds.[36] The government appealed to the Supreme Court.[37]

While Klein's case was pending, the Supreme Court reviewed a similar case, *United States v. Padelford*.[38] Like the decedent in *Klein*, the claimant in *Padelford* had participated in the rebellion, been pardoned, taken the loyalty oath, and sought the proceeds of captured property. The Supreme Court held that taking the oath and receiving the pardon made him "innocent in law as though he had never participated," and so the claimant's "property was purged of whatever offence he had committed and relieved from any penalty that he might have incurred."[39] As a result, the Court held that Padelford was entitled to the proceeds from the government's sale of his property.[40]

Shortly after the *Padelford* ruling, Congress enacted legislation intended to make a presidential pardon ineffective in establishing a right to the proceeds of seized property. That legislation provided that the Court of Claims must treat a presidential pardon as "conclusive evidence" that the pardon recipient aided the rebellion, and, upon such proof, "the jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant."[41] The legislation further stated that in all cases where the Court of Claims had rendered a favorable judgment for a claimant based solely on a presidential pardon—without additional proof of loyalty to the United States—"the Supreme Court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction."[42] Based on those provisions, the government asked the

[31] 80 U.S. (1 Wall.) 128 (1872).

[32] *Id.*

[33] 12 Stat. 820, § 3; *Klein*, 80 U.S. at 131.

[34] *Klein*, 80 U.S. (1 Wall.) at 131–32.

[35] *Id.* at 131.

[36] *Id.*

[37] *Id.*

[38] United States v. Padelford, 76 U.S. (1 Wall.) 531 (1869).

[39] *Id.* at 543.

[40] *Id.*

[41] *Klein*, 80 U.S. at 134 (internal quotation marks and citation omitted).

[42] *Id.* (internal quotation marks and citation omitted).

Supreme Court to remand Klein's case with instructions for the Court of Claims to dismiss the suit for lack of jurisdiction.[43]

The Supreme Court refused to dismiss the suit, holding that the way in which Congress stripped the courts of jurisdiction in this circumstance was unconstitutional. The Court acknowledged that "the legislature has complete control over the organization and existence of [the Court of Claims] and may confer or withhold the right of appeal from its decisions."[44] Had Congress "simply denied the right of appeal in a particular class of cases," the Court continued, "there could be no doubt that it must be regarded as an exercise of the power of Congress to make 'such exceptions from the appellate jurisdiction' as should seem to it expedient."[45] But, in the Court's view, Congress had gone further by purporting to remove jurisdiction only when certain evidence was furnished—evidence that a pardon was granted—and by requiring the suit's dismissal without allowing the court to rule on the meaning of the pardon.[46] The *Klein* Court held that, in so doing, Congress had "prescribe[d] a rule for the decision of a cause in a particular way"[47] and thus "passed the limit which separates the legislative from the judicial power."[48]

The Court expressed concerns about the fact that the jurisdiction-stripping provision required a favorable disposition for the government:

> Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the Court of Claims on appeal. Can it prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself.[49]

The Court raised an additional separation-of-powers objection to the legislation at issue in *Klein*, noting that "the legislature cannot change the effect of [a presidential] pardon any more than the executive can change a law," but Congress had attempted to do so through the provision.[50] The Court thus stated that the provision "certainly impairs the executive authority and directs the court to be instrumental to that end."[51]

Since *Klein*, no congressional enactment related to federal court jurisdiction appears to have been struck down under the precise separation-of-powers rule announced in *Klein*.[52] Meanwhile, legal scholars have wrestled with *Klein*'s language, trying to decipher what, precisely, the 19th-century Court meant.[53] The general consensus is that *Klein* holds that Congress's authority to regulate

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[43] *Id.* at 133–34.

[44] *Id.* at 145.

[45] *Id.*

[46] *Id.* at 145–46.

[47] *Id.* at 146. The Supreme Court also opined that Congress had infringed on the Executive's pardon power by nullifying the full effect of certain presidential pardons. *Id.* at 147–48.

[48] *Id.* at 147.

[49] *Id.*

[50] *Id.* at 148.

[51] *Id.*

[52] *See* Howard M. Wasserman, *The Irrepressible Myth of* Klein, 79 U. CIN. L. REV. 53, 70 (2010) ("But such blatantly violative enactments seem unlikely, which perhaps explains why no actual laws have been invalidated under this principle."). In *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), discussed later in this report, the Supreme Court invalidated a law based on separation-of-powers concerns that were related to, but distinct from, those at the heart of *Klein*. *Id.* at 265–66 (concluding that the statute at issue does not violate the constitutional restrictions *Klein* imposed but, nevertheless, "offends a postulate of Article III just as deeply rooted in our law as those we have mentioned").

[53] *See, e.g.*, FALLON, *supra* note 12, at 323 ("[T]he Court's [*Klein*] opinion raises more questions than it answers, and it (continued...)

federal court jurisdiction is limited by principles of separation of powers in that it may not direct a court how to rule in a particular case or how to apply the law to the facts in the case at hand.[54]

Some commentators interpret *Klein*'s holding more narrowly. For instance, one view is that *Klein* forbids Congress only from "dictat[ing] substantively unconstitutional results in a category of cases over which the courts have been given jurisdiction."[55] Another view is that *Klein* prohibits Congress from conditioning the Supreme Court's jurisdiction to hear certain matters on the Court eschewing the application of certain constitutional provisions.[56] Still another view is that *Klein*'s holding spoke to congressional attempts to "use its jurisdictional powers to compel a court to take jurisdiction of case and to decide it in a way which was at odds with the pardon provisions of the Constitution."[57] Relatedly, another view is that *Klein* forbids Congress from telling the courts how the Constitution must be interpreted.[58]

United States v. Sioux Nation of Indians

More than a century after its decision in *Klein*, the Supreme Court again considered separation-of-powers principles related to congressional control over federal court jurisdiction in a 1980 ruling, *United States v. Sioux Nation of Indians*.[59] In that case, the Court addressed *Klein*'s implications for legislation that directly affected a lawsuit related to long-standing treaty and property disputes between the Sioux Nation of Indians and the United States.[60]

The Fort Laramie Treaty of 1868 between the Sioux Nation and the United States established the Great Sioux Reservation for the "absolute and undisturbed use and occupation" of the tribe.[61] After the discovery of gold in the Black Hills region of the reservation, however, the United States sought to renegotiate the treaty.[62] Sioux leaders agreed in 1876 to cede the Black Hills region to the United States, and Congress subsequently abrogated the original treaty with the

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can be read to support a wide range of holdings."); Martin H. Redish & Christopher R. Pudelski, *Legislative Deception, Separation of Powers, & the Democratic Process: Harnessing the Political Theory of* United States v. Klein, 100 Nw. U. L. Rev. 437, 437–48 (2006) ("*United States v. Klein* ... is a case whose importance to the shaping of American political theory has never been fully grasped or articulated by scholars, and whose meaning has been comprehended by the federal judiciary—including the Supreme Court itself—virtually not at all."); Gordon G. Young, *Congressional Regulation of Federal Courts' Jurisdiction & Processes:* United States v. Klein *Revisited*, 1981 WIS. L. REV. 1189, 1195 (1981) ("[T]he *Klein* opinion combines the clear with the delphic.").

[54] *See, e.g.*, Stephen I. Vladeck, *Why* Klein *(Still) Matters: Congressional Deception & the War on Terrorism*, 5 J. NAT'L SECURITY L. & POL'Y 251, 252 (2011) ("[V]irtually all observers agree that *Klein* bars Congress from commanding the court to rule for a particular party in a pending case."); Wasserman, *supra* note 52, at 69–70 ("What really is going on under *Klein* is a prohibition on Congress using its legislative power to predetermine litigation outcomes through explicit commands to courts as to how to resolve particular factual and legal issues or telling courts who should prevail on given facts under existing law.").

[55] *See, e.g.*, Gordon G. Young, *A Critical Reassessment of the Case Law Bearing on Congress's Power to Restrict the Jurisdiction of the Lower Federal Courts*, 54 MD. L. REV. 132, 157 (1995).

[56] *See* J. Richard Doidge, Note, *Is Purely Retroactive Legislation Limited by the Separation of Powers?" Rethinking* United States v. Klein, 79 CORNELL L. REV. 910, 923 (1994).

[57] *See* Young, *supra* note 53, at 1223 n.179.

[58] *See* Redish & Pudelski, *supra* note 53, at 443.

[59] 448 U.S. 371 (1980).

[60] *Id.* at 374.

[61] Treaty of Fort Laramie, art. II, U.S.-Sioux Nation of Indians, May 25, 1868. To view the full text of the treaty, see *Transcript of Treaty of Fort Laramie (1968)*, MILESTONE DOCUMENTS, https://www.archives.gov/milestone-documents/fort-laramie-treaty (last visited Dec. 21, 2023).

[62] *See Sioux Nation of Indians*, 448 U.S. at 376–83.

Sioux.[63] However, many members of the Sioux Nation considered the renegotiation to be invalid and sought to pursue the tribe's rights under the original treaty.[64]

The Sioux Nation had no legal means to redress its grievances about the Black Hills cession until 1920, when Congress provided jurisdiction in the U.S. Court of Claims for the tribe to bring claims against the United States "under any treaties, agreements, or laws of Congress, or for the misappropriation of any funds or lands of" the Sioux Nation.[65] The Sioux Nation then brought a lawsuit alleging that the United States had committed a "taking" of the Black Hills without just compensation in violation of the Fifth Amendment.[66] The Court of Claims ultimately dismissed the lawsuit after concluding that the claim fell outside the grant of jurisdiction.[67]

Congress later created the Indian Claims Commission in 1946 to provide a forum for all past tribal grievances.[68] The Sioux Nation renewed its claims before the commission, which ultimately found in its favor.[69] On appeal, the Court of Claims partially reversed on the ground that *res judicata*—the legal doctrine that bars relitigating certain matters[70]—precluded the Sioux Nation from relitigating its takings claims about the Black Hills.[71]

In 1978, while the case was pending before the Indian Claims Commission to resolve other related disputes, Congress amended the Indian Claims Commission Act of 1946 to grant the Court of Claims jurisdiction to review the merits of the commission's ruling on the takings claim *despite* the *res judicata* bar.[72] Acting under that statute's authority, the Court of Claims (sitting en banc) affirmed the commission's merits ruling.[73] Before the Supreme Court, the government claimed that Congress, in amending the Indian Claims Commission Act, had "inadvertently passed the limit which separates the legislative from the judicial power" by "prescribing a rule for decision that left the court no adjudicatory function to perform," as *Klein* had prohibited.[74]

The Supreme Court ultimately distinguished *Klein* and held that Congress had acted within its power.[75] The Court reasoned that the amendment removed only a single issue from the court's review—the *res judicata* bar—and otherwise "left no doubt that the Court of Claims was free to decide the merits of the takings claim in accordance with the evidence it found and applicable

[63] *Id.* at 381–83.

[64] *Id.* at 383–84.

[65] Act of June 3, 1920, ch. 222, 41 Stat. 738.

[66] *Sioux Nation of Indians*, 448 U.S. at 384. The Takings Clause of the Constitution states that private property shall not "be taken for public use, without just compensation." U.S. CONST. amend. V.

[67] Sioux Tribe of Indians v. United States, 97 Ct. Cl. 613, 666 (Ct. Cl. 1942).

[68] Indian Claims Commission Act, ch. 959, 60 Stat. 1049 (codified as amended 25 U.S.C. § 70).

[69] Sioux Nation v. United States, 33 Ind. Cl. Comm'n 151 (1974).

[70] Res judicata (sometimes called claim preclusion) promotes the finality of judgments by barring a party from relitigating any claims that were raised, or could have been raised, in an earlier action between the same parties. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 13(1982); *see also* ASARCO, L.L.C. v. Mont. Res., Inc., 858 F.3d 949, 955 (5th Cir. 2017); United States v. Beane, 841 F.3d 1273, 1282–83 (11th Cir. 2016); Alexandra Bursak, Note, *Preclusions*, 91 N.Y.U. L. REV. 1651, 1653 (2016).

[71] United States v. Sioux Nation, 518 F.2d 1298, 1305–06 (Ct. Cl. 1975) ("It is elementary that in Indian Claims Commission Act proceedings a former decision on the merits by a court having jurisdiction is a *res judicata* bar to further litigation of the same claim.").

[72] *Id.* at 389 (citing Pub. L. No. 95-243, 92 Stat. 153 (1978), amending § 20(b) of the Indian Claims Commission Act). *See also*, 25 U.S.C. § 70s(b) (1976 ed., Supp. II).

[73] *Id.* at 389–90.

[74] United States v. Sioux Nation of Indians, 448 U.S. 371, 391–92 (1980) (quoting United States v. Klein, 80 U.S. (1 Wall.) 128, 147 (1872)).

[75] *Id.* at 391–407.

rules of law."[76] The Court also relied on other precedents holding that Congress may "waive the res judicata effect of a prior judgment entered in the Government's favor on a claim against the United States" without violating the separation of powers by intruding into the judiciary's sphere.[77] Further, the Court distinguished *Klein* on its facts, finding that in *Klein,* "Congress was attempting to decide the controversy in the Government's own favor," whereas in this case, Congress had only waived a defense so that the legal claim could be resolved on the merits in the first instance.[78]

Robertson v. Seattle Audubon Society

Robertson v. Seattle Audubon Society, decided 12 years later, also raised questions of separation of powers between the legislative and judicial branches related to a law designed to affect pending litigation.[79] In *Robertson*, environmental and timber-harvesting industry groups contested the Bureau of Land Management's and Forest Service's management of certain federal lands in Oregon and Washington that were home to the endangered northern spotted owl.[80] In general, the environmental groups asserted that the owl was not being adequately protected, whereas the industry groups maintained that the agencies' decisions overly restricted timber harvesting.[81]

While the lawsuits were pending, Congress enacted the "Northwest Timber Compromise," which established harvesting rules for timber in the contested lands inhabited by the northern spotted owl.[82] Section 318(b)(6)(A) of the legislation directly mentioned the pending cases:

> [T]he Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89-160 and Washington Contract Loggers Assoc. et al., v. F. Dale Robertson, Civil No. 89-99 (order granting preliminary injunction) and the case Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil No. 87-1160—FR.[83]

The environmental and industry plaintiffs interpreted this language as instructing courts to conclude that, if the federal parties complied with the newly enacted Northwest Timber Compromise, then they would have satisfied the statutory requirements central to the lawsuits.[84] Consequently, the plaintiffs challenged the provision, contending that Section 318(b)(6)(A) violated Article III of the Constitution "because it purported to direct the results in two pending cases."[85] The district courts disagreed, principally concluding that Section 318(b)(6)(A) modified

[76] *Id.* at 392.

[77] *Id.* at 396–402 (citing Cherokee Nation v. United States, 270 U.S. 476 (1926), Nock v. United States, 2 Ct. Cl. 451 (Ct. Cl. 1867), and Pope v. United States, 323 U.S. 1 (1944)).

[78] *Id.* at 405.

[79] Robertson v. Seattle Audubon Soc'y, 503 U.S. 429 (1992).

[80] *Id.* at 431–33.

[81] *Id*. at 431–32.

[82] Department of the Interior and Related Agencies Appropriations Act, 1990 § 318, Pub. L. No. 101-121, 103 Stat. 745 (1989); *see Robertson*, 503 U.S. at 433.

[83] Department of the Interior and Related Agencies Appropriations Act, 1990 § 318(b)(6)(A); *see Robertson*, 503 U.S. at 434–35.

[84] *See* Department of the Interior and Related Agencies Appropriations Act, 1990 § 318(b)(6)(A).

[85] *Robertson*, 503 U.S. at 436.

the relevant environmental laws, and, under that statutory interpretation, the provision was constitutional.[86]

The U.S. Court of Appeals for the Ninth Circuit reversed, holding that Section 318(b)(6)(A) was unconstitutional under *Klein*. The appellate court held that "[t]he clear effect of subsection (b)(6)(A) is to direct that, if the government follows the plan incorporated in subsections (b)(3) and (b)(5), then the government will have done what is required under the environmental statutes involved in these cases."[87] The Ninth Circuit concluded that "Section 318 does not, by its plain language, repeal or amend the environmental laws underlying th[e] litigation" but rather "seeks to perform functions reserved to the Courts by Article III of the Constitution" by "direct[ing] the court to reach a specific result and make certain factual findings under existing law in connection with two cases pending in federal court."[88]

The Supreme Court unanimously disagreed with the district and appellate courts' interpretations of Section 318(b)(6)(A). Without opining on the Ninth Circuit's application of *Klein*, the Court held that Section 318(b)(6)(A) created new standards for complying with the five statutes underlying the lawsuits. Rather than having to comply with those statutes, the contested land could, instead, be managed according to the new law.[89] As a result, the Court in *Robertson* concluded that the provision did not present a *Klein*-like separation-of-powers problem, suggesting that Congress has the power to target particular cases so long as the new legislation allows the courts to independently apply any changes to the law.[90]

Plaut v. Spendthrift Farm, Inc.

A few years later, in *Plaut v. Spendthrift Farm, Inc.*, the Supreme Court considered a question related to the rule of *Klein*: whether legislation that directs courts to reopen final judgments unconstitutionally intrudes on the judiciary.[91] *Plaut* involved an amendment to the Securities Exchange Act of 1934 that Congress enacted after two Supreme Court opinions announced a time limit for bringing civil actions seeking damages under Section 10(b) of the act.[92] In *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, the Court had established a statute of limitations for bringing Section 10(b) claims.[93] The same day, in *James B. Beam Distilling Company v. Georgia*, the Court had held that when a case announces a new rule and applies that rule to the parties in that case—which happened in *Lampf*—the new rule must also be applied to all pending cases.[94] As a result, lower courts considering other pending Section 10(b) claims similar to those in *Lampf* dismissed those claims.

Six months after the Supreme Court issued the *Lampf* and *Beam Distilling* opinions, Congress added Section 27A to the Securities Exchange Act.[95] Section 27A functionally nullified the

[86] *Id.*

[87] Seattle Audubon Soc'y v. Robertson, 914 F.2d 1311, 1316 (9th Cir. 1990).

[88] *Id.*

[89] *Robertson*, 503 U.S. at 437–38 ("We conclude that subsection (b)(6)(A) compelled changes in law, not findings or results under old law.").

[90] *Id.*

[91] Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995).

[92] *Id.* at 213–14.

[93] Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 364 (1991).

[94] James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 544 (1991); *see Plaut*, 514 U.S. at 214.

[95] Congress did so through Section 476 of the Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, 105. Stat. 2236.

Court's ruling that the statute of limitations announced in *Lampf* must be applied to pending Section 10(b) civil claims. In particular, Section 27A directed courts to reinstate (upon a timely filed petition) cases that had been dismissed because of *Lampf* and *Beam Distilling* but would have been timely under the governing statute of limitations when initially filed.[96]

The plaintiffs in *Plaut* sought to reopen their Section 10(b) suit for securities fraud in light of Section 27A.[97] The district court nevertheless dismissed their suit on the ground that Section 27A's reopening provision violates the doctrine of separation of powers.[98] The Sixth Circuit,[99] and ultimately the Supreme Court, affirmed the judgment of the district court.[100]

The Supreme Court held that Section 27A, by applying retroactively to *final decisions*, "reverses a determination once made, in a particular case" and thus violates the separation of powers.[101] The Court distinguished the command in Section 27A from other retroactive laws that mandate "an appellate court [to] apply [the new] law in reviewing judgments *still on appeal* that were rendered before the law was enacted."[102] By directing courts to reopen non-pending, previously decided cases, the Court continued, Congress violates the separation of powers by "depriving judicial judgments of the conclusive effect that they had when they were announced."[103]

The Court noted that the separation-of-powers concerns in *Plaut* were related to, but distinct from, those at the heart of *Klein*.[104] Like the Court in *Klein*, the Court in *Plaut* appeared wary of Congress legislating to curb the judiciary's reserved Article III powers, particularly those related to rendering final, dispositive judgments.[105] Also like the Supreme Court in *Klein*, the Court in *Plaut* expressed the need for an independent judiciary. It noted that the Framers "lived among the ruins of intermingled legislative and judicial powers, which had been prevalent in the colonies long before the Revolution, and which after the Revolution had produced factional strife and partisan oppression" and that they were thus keenly aware of the need for a judicial branch independent from the legislature.[106] However, the Supreme Court emphasized that its ruling did not disturb its long-held view that Congress, by enacting new legislation, may "alter[] the prospective effect of injunctions entered by Article III courts."[107]

Miller v. French

Miller v. French began where *Plaut* left off by examining Congress's ability "to alter the prospective effect of previously entered injunctions."[108] The case involved a challenge to a

[96] *See id.* § 476.

[97] *Plaut*, 514 U.S. at 215.

[98] Plaut v. Spendthrift Farm, Inc., 1 F.3d 1487, 1490 (6th Cir. 1993).

[99] *Id.*

[100] *Plaut*, 514 U.S. at 240.

[101] *Id.* at 225 (quoting THE FEDERALIST No. 81, at 545).

[102] *Id.* at 226 (emphasis added).

[103] *Id.* at 227–28.

[104] *Id.* at 265–66 (concluding that the statute at issue does not violate the constitutional restrictions *Klein* imposed but, nevertheless, "offends a postulate of Article III just as deeply rooted in our law as those we have mentioned").

[105] *Id.* at 218.

[106] *Id.* at 219–24.

[107] *Id.* at 222 (citing State of Pennsylvania v. The Wheeling & Belmont Bridge Co., 59 U.S. (1 How.) 421 (1855)).

[108] Miller v. French, 530 U.S. 327, 344 (2000).

provision of the Prison Litigation Reform Act of 1995 (PLRA),[109] which governs lawsuits brought by prisoners challenging conditions of confinement.[110] The statute spells out the requirements for obtaining[111] and terminating[112] prospective relief—that is, relief such as an injunction that is designed to prevent ongoing or future injuries.[113] At issue in *Miller* was 18 U.S.C. § 3626(e)(2), which, as relevant here, mandates that any motion to terminate an injunction "shall operate as a stay" of that injunction beginning 30 days after the motion is filed and lasting until the court rules on it.[114]

In the *Miller* lawsuit, inmates at an Indiana prison had obtained an injunction in the mid-1980s requiring the prison to rectify prison conditions that violated the Eighth Amendment.[115] In 1997, the state moved to terminate the injunction under the PLRA.[116] The inmates objected and asked the district court to enjoin application of the PLRA's automatic stay provision (Section 3626(e)(2)) on the theory that it violated separation-of-powers principles.[117] The district court agreed and enjoined the stay.[118]

The Seventh Circuit affirmed. It first construed the language in Section 3626(e)(2), which instructed that motions to terminate prospective relief "*shall* operate as a stay"[119] as unequivocally "restrict[ing] the equitable powers of the federal courts."[120] So construed, the Seventh Circuit concluded that the provision violated the separation-of-powers principle announced in *Plaut* that Article III "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy."[121] The Seventh Circuit further concluded that Section 3626(e)(2) violated the principles of *Klein* because, according to the court, it mandated a rule of decision by requiring the previously ordered prospective relief to be terminated.[122]

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[109] Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, Title VIII (1995).

[110] 42 U.S.C. § 1997e.

[111] 18 U.S.C. § 3626(a).

[112] *Id.* § 3626(b).

[113] *See, e.g.*, Colo. Cross Disability Coal. v. Abercrombie & Fitch Co., 765 F.3d 1205, 1211 (10th Cir. 2014) ("When prospective relief—such as an injunction—is sought, 'the plaintiff must be suffering a continuing injury or be under a real and immediate threat of being injured in the future.'" (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983))).

[114] 18 U.S.C. § 3626(e)(2). There is an exception allowing the court to postpone the effective date of the automatic stay for no more than 60 days "for good cause." *Id.* § 3626(e)(4).

[115] Miller v. French, 530 U.S. 327, 332 (2000); French v. Owens, 777 F.2d 1250 (7th Cir. 1985).

[116] French v. Duckworth, 178 F.3d 437, 438 (7th Cir. 1999).

[117] Miller v. French, 530 U.S. 327, 334 (2000).

[118] *Id.* at 334–35.

[119] 18 U.S.C. 3626(e)(2) (emphasis added).

[120] *Duckworth*, 178 F.3d at 443.

[121] *Id.* at 446 (quoting Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218–19 (1995)). According to the Seventh Circuit, "[Section 3626](e)(2) places the power to review judicial decisions outside of the judiciary" because "it is a self-executing legislative determination that a specific decree of a federal court—here the decree addressing conditions at [the Indiana prison]—must be set aside at least for a period of time, no matter what the equities, no matter what the urgency of keeping it in place," thus "amount[ing] to an unconstitutional intrusion on the power of the courts to adjudicate cases." *Id.*

[122] *Id.*

The Supreme Court rejected the Seventh Circuit's constitutional holding.[123] Contrary to the Seventh Circuit's opinion, the Supreme Court concluded that Section 3626(e)(2) comports with *Plaut* because, in that case, the Supreme Court had been "careful to distinguish the situation before the Court in [*Plaut*]—legislation that attempted to reopen the dismissal of a suit *seeking money damages*—from legislation that 'altered the prospective effect of *injunctions* entered by Article III courts.'"[124] The Supreme Court in *Miller* further explained that "[p]rospective relief under a continuing executory decree," like the district court's injunction against the prison, "remains subject to alteration due to changes in the underlying law."[125] The Court concluded that the automatic stay provision in Section 3626(e)(2) "helps implement the change" in the underlying law for prisoner litigation, which "restricted courts' authority to issue and enforce prospective relief concerning prison conditions, requiring that such relief be supported by findings and precisely tailored to what is needed to remedy the violation of a federal right."[126] Thus, Section 3626(e)(2), "[b]y establishing new standards for the enforcement of prospective relief" in PLRA lawsuits, "altered the relevant underlying law."[127]

Bank Markazi v. Peterson

The Supreme Court's next examination of separation-of-powers limitations on Congress's authority to regulate federal court jurisdiction came in a 2016 opinion, *Bank Markazi v. Peterson*.[128] The lawsuit involved an amendment to the "terrorism exception" to the Foreign Sovereign Immunities Act of 1976 (FSIA).[129] Under the FSIA, foreign governments are generally immune from suit in U.S. courts.[130] The terrorism exception lifts that immunity for suits seeking monetary damages for personal injury or death caused by state-sponsored terrorism.[131] The claimants in *Bank Markazi*, a group of more than 1,000 victims of Iran-sponsored acts of terrorism, sought to use this exception to pursue claims under the FSIA.[132]

Claimants filing suit under the FSIA's terrorism exception often faced difficulties enforcing favorable judgments because (1) initially, only foreign-state property located in the United States that was used for commercial activity could be used to satisfy judgments;[133] and (2) the FSIA exempts property of a "foreign central bank or monetary authority held for its own account."[134] Congress enacted several measures over time to ease difficulties in enforcing judgments. The specific legislation at issue in *Bank Markazi* was Section 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012, codified at 22 U.S.C. § 8772.[135] Section 8772 mandates that, upon specified court findings related to the ownership of certain contested assets, particular Iranian financial assets "shall be subject to execution ... in order to satisfy any judgment ...

[123] Miller v. French, 530 U.S. 327, 350 (2000).

[124] *Id.* at 344 (quoting *Plaut*, 514 U.S. at 232) (emphasis added).

[125] *Id.*

[126] *Id.* at 347–48.

[127] *Id.* at 347.

[128] 136 S. Ct. 1310 (2016).

[129] *See id.* at 1317 (citing 28 U.S.C. § 1605A).

[130] 28 U.S.C. § 1604.

[131] *Id.* § 1605A.

[132] *Bank Markazi*, 136 S. Ct. at 1319–20.

[133] 28 U.S.C. § 1610(a); *see Bank Markazi*, 136 S. Ct. at 1318.

[134] 28 U.S.C. § 1611(b)(1); *see Bank Markazi*, 136 S. Ct. at 1318.

[135] Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, 126 Stat. 1214 (codified at 22 U.S.C. § 8772).

awarded against Iran for damages for personal injury or death caused by" acts of terrorism covered by the FSIA terrorism exception.[136] Section 8772 explicitly defines the financial assets to be made available as those that had been identified in the *Bank Markazi* litigation.[137] The law also clarifies that it does not apply to any other assets or other lawsuits outside of the *Bank Markazi* litigation.[138]

The *Bank Markazi* plaintiffs invoked Section 8772 to seek satisfaction of unpaid judgments totaling $1.75 billion from assets held in a New York bank for the Central Bank of Iran, also known as Bank Markazi.[139] The district court made the applicable statutory findings and ordered Bank Markazi to turn over the requested bond assets.[140]

Relying on *Klein*, Bank Markazi contested this ruling on the ground that Section 8772 violated the separation of powers by "effectively dictat[ing] specific factual findings in connection with a specific litigation—invading the province of the courts."[141] The district court disagreed, reasoning that under Section 8772, courts may still independently make the ownership findings that the statute requires, free of congressional interference.[142] The Second Circuit affirmed, concluding that Section 8772 "does not usurp the judicial function," but "rather, it retroactively changes the law applicable in this case."[143] Doing so, the Second Circuit added, is "a permissible exercise of legislative authority."[144]

The Supreme Court agreed, rejecting Bank Markazi's argument that Section 8772 violated the rule of *Klein*. Bank Markazi had principally argued that Section 8772, by "purport[ing] to alter the law for a single pending case concerning the payment of money from one party to another," allows Congress to "commandeer the judiciary and dictate how courts must decide individual cases before them."[145] This, Bank Markazi said, was prohibited by *Klein*, which said that Congress cannot "prescribe rules of decision to the Judicial Department of the government in cases pending before it."[146] Nor did the required statutory factfinding cure this deficiency because, Bank Markazi asserted, the underlying facts were undisputed and thus left nothing for the court do to other than compel Bank Markazi to pay the judgment award.[147]

The Supreme Court did not similarly interpret *Klein*. Rather, the Court reaffirmed the legitimate "congressional power to make valid statutes retroactively applicable to pending cases."[148] Thus, the Court appeared to minimize the import of *Klein* while confirming Congress's power to "direct courts to apply newly enacted, outcome-altering legislation in pending civil cases."[149] Further, the Court added that Congress "does not impinge on judicial power when it directs courts to apply a

[136] 22 U.S.C. § 8772(a); *see Bank Markazi*, 136 S. Ct. at 1318–19.

[137] 22 U.S.C. § 8772(b); *see Bank Markazi*, 136 S. Ct. at 1319.

[138] 22 U.S.C. § 8772(c).

[139] *Bank Markazi*, 136 S. Ct. 1316, 1320–21.

[140] *Id*. at 1321.

[141] *Id*. at 1322 (internal quotation marks and citation omitted).

[142] *Id*.

[143] Peterson v. Islamic Republic of Iran, 758 F.3d 185, 191 (2d Cir. 2014).

[144] *Id*.

[145] Brief for Petitioner at 11, Bank Markazi v. Peterson, 136 S. Ct. 1310 (2016) (No. 13-770).

[146] *Id.* at 43 (quoting United States v. Klein, 80 U.S. 128, 146 (1872)).

[147] *Id.* at 47–48.

[148] Bank Markazi v. Peterson, 136 S. Ct. 1310, 1324 (2016).

[149] *Id*. at 1325.

new legal standard to undisputed facts," as Congress did when enacting Section 8772.[150] In other words, the Court is unlikely to find a *Klein* violation when Congress creates a new substantive law for courts to apply, even when, functionally, that new law may apply to only one specific set of cases and may result in only one outcome given the undisputed facts. With these principles in mind, the Court concluded that Section 8772 lawfully "provides a new standard clarifying that, if Iran owns certain assets, the victims of Iran-sponsored terrorist attacks will be permitted to execute against those assets."[151] However, in doing so, the Court also stressed that Section 8772 is "an exercise of congressional authority regarding *foreign affairs*, a domain in which the controlling role of the political branches is both necessary and proper."[152]

The *Bank Markazi* majority took a formalistic approach in its analysis. By contrast, Chief Justice Roberts, joined by Justice Sotomayor, filed a dissent that took a functional approach, analyzing the challenged statute based on its dispositive effect on certain litigation.[153] In the dissent's view, Section 8772 was akin to Congress enacting a law that said "respondents win" and thus unconstitutionally invaded the judiciary by "enacting a bespoke statute tailored to this case that resolves the parties' specific legal disputes to guarantee respondents victory."[154] The dissent acknowledged that courts "generally must apply a retroactively applicable statute to pending cases," but if that retroactive law reads as "respondents win" in a pending lawsuit, that hypothetical law—like Section 8772—would "implicat[e] profound issues of separation of powers."[155] Further, the dissent warned, "Hereafter, with this Court's seal of approval, Congress can unabashedly pick the winners and losers in particular pending cases."[156]

Patchak v. Zinke

The Supreme Court revisited separation-of-powers-based limitations on jurisdiction-stripping legislation when it decided *Patchak v. Zinke* in 2017.[157] *Patchak* involved a challenge to the Department of the Interior's (DOI's) decision to place a tract of land in Wayland Township, MI—known as the "Bradley Property"—in trust under the Indian Reorganization Act for the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians.[158] After the tribe began building a casino on the Bradley Property, David Patchak, who lived in Wayland Township, sued DOI, arguing that it lacked authority under the Indian Reorganization Act to place the Bradley Property in trust for the tribe.[159]

Patchak's claims were litigated in various stages and were pending before the district court in 2014 when President Obama signed into law the Gun Lake Trust Land Reaffirmation Act ("Gun

[150] *Id*.

[151] *Id*. at 1326.

[152] *Id*. at 1328 (emphasis added). The Court further noted, "In pursuit of foreign policy objectives, the political branches have regulated specific foreign-state assets by, *inter alia*, blocking them or governing their availability for attachment," and "[s]uch measures have never been rejected as invasions upon the Article III judicial power." *Id.*

[153] *Id*. at 1329–38 (Roberts, C.J., dissenting).

[154] *Id.* at 1330.

[155] *Id.* at 1334–35. The majority agreed that a law directing judgment for a particular party upon certain findings "would be invalid" but concluded that Section 8772 did not actually do that. *Id.* at 1326 (majority opinion). Rather, in the majority's view, Section 8772 "suppl[ies] a new legal standard effectuating the lawmakers' reasonable policy judgment." *Id.*

[156] *Id.* at 1338 (Roberts, C.J., dissenting).

[157] 137 S. Ct. 2091 (2017).

[158] Patchak v. Jewell, 828 F.3d 995, 999 (D.C. Cir. 2016).

[159] *Id.* at 999–1000.

Lake Act").[160] The Gun Lake Act declared that "[t]he land taken into trust by the United States for the benefit of the Match-E-Be-Nash-She-Wish Band of Indians ... is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed."[161] Additionally, the Act stripped federal courts of jurisdiction to hear claims related to the Bradley Property:

> Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of [the] Act) relating to the [Bradley Property] shall not be filed or maintained in a Federal court and shall be promptly dismissed.[162]

A House report on the Gun Lake Act stated that the legislation was necessary because the underlying DOI decision might have been unlawful under then-existing precedent.[163] The report referenced Patchak's lawsuit, noting that the legislation would "void [the] pending lawsuit."[164]

After enactment of the Gun Lake Act, Patchak contended in the lower court that the Act violated the separation-of-powers doctrine by encroaching on the judiciary's Article III powers.[165] The district court rejected that argument, concluding that the new law deprived it of jurisdiction to hear the case, and dismissed the suit.[166] The D.C. Circuit affirmed, explaining that, so long as the act is not otherwise unconstitutional, "[t]he language of the Gun Lake Act makes plain that Congress has stripped the federal courts of subject matter jurisdiction to consider the merits" of Patchak's complaint.[167] The court then proceeded to consider and reject each of Patchak's constitutional challenges to the act.[168]

Relying on *Klein* and its progeny, the D.C. Circuit reasoned that, just as Congress may "direct[] courts to apply a new legal standard to undisputed facts,"[169] it may also "remove[] the judiciary's authority to review a particular case or class of cases."[170] The court concluded that Congress supplied a new legal standard when it enacted the Gun Lake Act, even though the act did not directly amend the substantive laws underlying the lawsuit.[171]

In a fractured 4-2-3 decision, the Supreme Court affirmed the D.C. Circuit's ruling.[172] Although a majority of the Court concluded that Patchak's claims must be dismissed, the Justices disagreed on the rationale, and the decision produced no precedential rule. Nonetheless, the various opinions reflect different ways of thinking about the continuing application of *Klein*.

The plurality opinion, authored by Justice Thomas and joined by Justices Breyer, Alito, and Kagan, concluded that the jurisdiction-stripping provision of the Gun Lake Act does not violate Article III of the Constitution.[173] Justice Thomas's plurality opinion summarized *Klein* and its progeny as creating the following rule: "Congress violates Article III when it compels findings or

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[160] Gun Lake Trust Land Reaffirmation Act, Pub. L. No., 128 Stat. 1913, § 2(a) (Sept. 26, 2014).

[161] *Id.* § 2(a).

[162] *Id.* § 2(b).

[163] H.R. REP. NO. 113-590 (2014).

[164] *See id*. at 2.

[165] Patchak v. Jewell, 828 F.3d 995, 1001 (D.C. Cir. 2016).

[166] Patchak v. Jewell, 109 F. Supp. 3d 152, 165 (D.D.C. 2015).

[167] *Patchak*, 828 F.3d at 1001.

[168] *Id.* at 1001–07.

[169] Bank Markazi v. Peterson, 136 S. Ct. 1310, 1325 (2016).

[170] *Patchak*, 828 F.3d at 1002.

[171] *Id.* at 1002–03.

[172] Patchak v. Zinke, 138 S. Ct. 897 (2018).

[173] *Id.*

results under old law. But Congress does not violate Article III when it changes the law."[174] Although it appeared in a non-binding plurality opinion, this may be a helpful summary of the Court's current approach to jurisdiction-stripping statutes.

Based on that rule, the Justices in the plurality agreed that Congress cannot usurp the judiciary's power by saying "in *Smith v. Jones*, Smith wins," thus compelling an Article III court to make certain findings under existing law.[175] Nonetheless, Justice Thomas did not think *Klein* required looking behind the express language of a law and inquiring into "Congress' unexpressed motives."[176] Instead, Justice Thomas viewed the Gun Lake Act to be a facially neutral enactment that simply made a change to current law: "Before the Gun Lake Act, federal courts had jurisdiction to hear these actions. Now they do not. This kind of legal change is well within Congress' authority and does not violate Article III."[177] In this vein, the plurality described the Gun Lake Act as a jurisdiction-stripping statute,[178] which "'change[d] the law' for the purpose of Article III, just as other exercises of Congress' legislative authority."[179] Thus, the plurality rejected Patchak's argument that the Gun Lake Act's phrase *shall be promptly dismissed* directs courts to reach a particular outcome.[180] Rather, the plurality concluded, the phrase's mandatory language "'simply imposes the consequences' of a court's determination that it lacks jurisdiction because a suit relates to the Bradley Property."[181]

The plurality also rejected Patchak's contention that the Gun Lake Act had the same constitutional flaws as the law at issue in *Klein*. The plurality distinguished *Klein* in two ways. First, Justice Thomas emphasized that in *Klein*, Congress had unlawfully attempted to indirectly determine the meaning and effect of a pardon—which the judiciary, not Congress, has the power to do—by stripping courts of jurisdiction whenever claimants cited pardons as evidence of loyalty.[182] Conversely, the Gun Lake Act, he explained, "does not attempt to exercise a power that the Constitution vests in another branch."[183] Second, the statute in *Klein* purported to give federal courts jurisdiction to hear claims related to pardons but removed that jurisdiction in the event that a court found that a pardoned claimant should prevail.[184] In contrast, the plurality opined, the Gun Lake Act removed an entire class of cases from judicial review; it did not selectively strip jurisdiction based on how a particular party fared.[185]

Justice Ginsburg and Justice Sotomayor each concurred only in the judgment, concluding that the Gun Lake Act should be construed as restoring the United States' immunity from suit.[186] In

[174] *Id.* at 905 (internal citations, quotation marks, and alterations omitted).

[175] *Id.*

[176] *Id.* at 910.

[177] *Id*. at 905.

[178] The plurality viewed the Gun Lake Act to be a jurisdiction-stripping statute despite its failure to explicitly use the word *jurisdiction*, noting that the "Court does not require jurisdictional statutes to incant magic words." *Id.* (internal quotation marks and citation omitted).

[179] *Id*. at 906 (citing Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218 (1995)). Justice Thomas added, "The constitutionality of jurisdiction-stripping statutes like this one is well established." *Id*. at 908.

[180] *Id*.

[181] *Id*. (quoting Miller v. French, 530 U.S. 327, 349 (2000)). Justice Breyer made a similar point in a separate concurrence. See *id*. at 911 (Breyer, J. concurring).

[182] *Id*. at 909.

[183] *Id*. at 909.

[184] *Id*.

[185] *Id*.

[186] *Id*. at 912–13 (Ginsburg, J., concurring).

enacting the Gun Lake Act, Justice Ginsburg opined, Congress had reinstated the government's sovereign immunity for *all* suits related to the Bradley Property.[187] Neither concurring Justice fully explained why viewing the Gun Lake Act through the lens of sovereign immunity alleviates *Klein* concerns, although Justice Sotomayor voiced her agreement with the dissenting Justices that jurisdiction-stripping statutes that "deprive[] federal courts of jurisdiction over a single proceeding" violate the principle of *Klein* and "should be viewed with great skepticism."[188]

Chief Justice Roberts, joined by Justices Kennedy and Gorsuch, dissented. As in *Bank Markazi*, the Chief Justice took a functional view of the statute at issue. The dissent contended that the Gun Lake Act directed the outcome of a single pending case and thus unconstitutionally intruded on the exclusive power of the judicial branch.[189] Further, Chief Justice Roberts would have held "that Congress exercises the judicial power when it manipulates jurisdictional rules to decide the outcome of a particular pending case."[190] In his view, there was no material difference between a law stating that "'[t]he court lacks jurisdiction over Jones's pending suit against Smith' and one stating 'In the case of *Smith v. Jones*, Smith wins,'" because in both examples, "Congress has resolved the specific case in Smith's favor."[191]

Mountain Valley Pipeline, LLC v. Wilderness Society

The latest major litigation concerning Congress's ability to enact legislation targeting pending cases was *Mountain Valley Pipeline, LLC v. Wilderness Society*.[192] The Supreme Court did not issue a merits decision in *Mountain Valley Pipeline*, but the U.S. Court of Appeals for the Fourth Circuit issued a decision and two separate opinions that directly confronted the *Klein* issue in the case. The litigation therefore provides some insight into how federal courts currently analyze jurisdiction-stripping statutes.

Mountain Valley Pipeline was a set of consolidated cases involving legal challenges to the Mountain Valley Pipeline, a natural gas transmission pipeline planned to run from West Virginia to Virginia.[193] Construction and operation of the pipeline require numerous federal and state permits and approvals, and opponents of the pipeline filed multiple lawsuits challenging various agency actions related to the project. Many of those cases were litigated in the U.S. Court of Appeals for the Fourth Circuit, the federal court with jurisdiction over the states where the pipeline is being constructed. Over the course of several years, the Fourth Circuit vacated multiple approvals that were necessary for construction of the pipeline.[194] The same panel of three Fourth Circuit judges decided most of the cases related to the pipeline, leading Mountain Valley

[187] *Id*. at 913.

[188] *Id*. at 913 (Sotomayor, J., concurring).

[189] *Id*. at 914–22 (Roberts, C.J., dissenting).

[190] *Id*. at 916–18.

[191] *Id*. at 920.

[192] 144 S. Ct. 42 (2023) (Mem).

[193] *See* id.; *Overview*, MOUNTAIN VALLEY PIPELINE PROJECT, https://www.mountainvalleypipeline.info/overview/ (last visited Dec. 21, 2023).

[194] Sierra Club, Inc. v. U.S. Forest Service, 897 F.3d 582 (4th Cir. 2018); Sierra Club v. U.S. Army Corps of Eng'rs, 909 F.3d 635 (4th Cir. 2018); Wild Va. v. U.S. Forest Serv., 24 F.4th 915 (4th Cir. 2022); Sierra Club v. W. Va. Dep't of Env't Prot., 64 F.4th 487 (4th Cir. 2023).

Pipeline, LLC (MVP), the company constructing the pipeline, to contend that there could be a perception of unfairness in that venue.[195]

On June 3, 2023, President Biden signed the Fiscal Responsibility Act of 2023 (FRA).[196] Section 324(c) of the FRA provides:

> Notwithstanding any other provision of law ... Congress hereby ratifies and approves all authorizations, permits, verifications, extensions, biological opinions, incidental take statements, and any other approvals or orders issued pursuant to Federal law necessary for the construction and initial operation at full capacity of the Mountain Valley Pipeline[.][197]

The same subsection further directs the relevant federal agencies to "continue to maintain" relevant approvals or orders necessary for the construction and operation of the pipeline.[198]

The FRA also includes language apparently intended to foreclose further consideration of the pipeline by the Fourth Circuit. Section 324(e)(1) of the FRA provides: "Notwithstanding any other provision of law, no court shall have jurisdiction to review" actions of certain federal or state agencies granting approvals necessary for the construction and operation of the pipeline, "whether issued prior to, on, or subsequent to the date of enactment of this section, and including any lawsuit pending in a court as of the date of enactment of this section."[199] To the extent pipeline opponents might challenge that jurisdictional provision itself, Section 324(e)(2) grants the U.S. Court of Appeals for the D.C. Circuit "original and exclusive jurisdiction over any claim alleging the invalidity of this section or that an action is beyond the scope of authority conferred by this section."[200]

Three cases relevant to the dispute over FRA Section 324 were consolidated in the Fourth Circuit under the name *Appalachian Voices v. U.S. Department of the Interior*.[201] The litigation brought two key issues before the Fourth Circuit. First, the petitioners challenging the pipeline filed motions to stay certain agency permits and approvals related to the pipeline pending judicial review.[202] The federal government and MVP opposed the stay motions and moved to dismiss the consolidated petitions for review for lack of jurisdiction.[203] MVP and the government argued that Section 324(e) of the FRA deprived the Fourth Circuit of subject matter jurisdiction over the petitions for review. As the company described Section 324(c) of the FRA, "Congress explicitly 'ratifie[d] and approve[d]' all federal authorizations, permits, and other actions necessary for the construction and operation" of the pipeline, "[n]otwithstanding any other provision of law."[204] Both MVP and the government also asserted that, as a result of that authorization, the petitioners'

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[195] Rachel Weiner, *Controversial Federal Court Changes Debated in Manchin Negotiations*, WASHINGTON POST (Aug. 5, 2022, 6:00 AM), https://www.washingtonpost.com/dc-md-va/2022/08/05/mountain-valley-manchin-deal-court (last visited Dec. 22, 2023).

[196] Fiscal Responsibility Act of 2023, § 324 (c), Pub. L. No. 118-5, 137 Stat. 10, 47.

[197] *Id.* § 324 (c)(1); 137 Stat. 47.

[198] *Id.* § 324 (c)(2); 137 Stat. 47.

[199] *Id.* § 324 (e)(1); 137 Stat. 47–48.

[200] *Id.* § 324 (e)(2); 137 Stat. 48.

[201] Appalachian Voices v. U.S. Dep't of the Interior, 78 F.4th 71 (4th Cir. 2023) (Nos. 23-1384, 23-1592, 23-1592).

[202] A stay is a form of temporary injunctive relief that essentially serves to pause litigation or other proceedings. See CRS Report R46902, *Nationwide Injunctions: Law, History, and Proposals for Reform*, by Joanna R. Lampe (2021). In these cases, a stay of one or more agency approvals would mean that MVP would not be able to move forward with construction or operation of the Pipeline while federal courts considered the petitioners' challenges.

[203] Motion to Dismiss (MVP), *Appalachian Voices*, 78 F.4th 71 (4th Cir. 2023) (No. 23-1384, ECF No. 36, at 9) (June 5, 2023); Motion to Dismiss (Federal Respondents), *Id.* (No. 23-1384, ECF No. 41, at 8) (4th Cir. June 14, 2023).

[204] Motion to Dismiss (Federal Respondents), *supra* note 203, at 7; Motion to Dismiss (MVP), *supra* note 203, at 5.

challenges to agency approvals of the pipeline based on pre-FRA law must fail, so the cases had become moot because the court could no longer award the petitioners' requested relief.[205]

The petitioners opposed the motions to dismiss, arguing that FRA Section 324 could not validly require dismissal because Section 324 was unconstitutional.[206] The petitioners relied on *Klein*, arguing that Section 324 violates separation-of-powers limits by requiring courts to decide cases in a certain way. The petitioners recognized the recent decision upholding a jurisdiction-stripping provision in *Patchak*, but they argued that the case was not binding because no reasoning earned the support of more than four Justices. The *Appalachian Voices* petitioners instead asked the court to adopt the reasoning of the dissent in *Patchak*, in which Chief Justice Roberts, joined by Justices Kennedy and Gorsuch, argued that Congress impermissibly "exercises the judicial power when it manipulates jurisdictional rules to decide the outcome of a particular pending case."[207]

The Fourth Circuit issued orders staying the relevant agency actions during the pendency of the petition for review without directly addressing the *Klein* issue.[208] MVP then filed with the Supreme Court an emergency application to vacate the stays.[209] On July 27, 2023, the Supreme Court granted the application to vacate the stays issued by the Fourth Circuit without a written opinion.[210] While the Court may have considered the constitutionality of Section 324 in ruling on the stay application, its order did not discuss the merits of the case, including whether Congress validly limited federal court jurisdiction to consider challenges to the pipeline. Thus, the Supreme Court's action did not expressly require the Fourth Circuit to dismiss the petitions for review challenging the pipeline.

Instead, the Fourth Circuit on remand considered the constitutionality of Section 324, and it granted the motions to dismiss the petitions for review.[211] Judge Wynn's opinion for a unanimous panel held that FRA Section 324(c) rendered the petitions moot by ratifying and approving all necessary authorizations for the pipeline and that FRA Section 324(e)(1) eliminated the Fourth Circuit's jurisdiction over the petitions.[212]

Judge Gregory and Judge Thacker each wrote concurring opinions. Judge Gregory's concurrence agreed that the case must be dismissed under current law but expressed concerns that Section 324

[205] *Supra* note 203.

[206] Petitioners' Opposition to Federal Respondents' Motion to Dismiss and Intervenor's Motion to Dismiss or, in the Alternative, for Summary Denial, *Appalachian Voices*, 78 F.4th 71 (No. 23-1384, ECF No. 43) (4th Cir. June 26, 2023).

[207] *Id.* at 15 (citing Patchak v. Zinke, 583 U.S. 244, 259 (2018) (Roberts, C.J., dissenting)).

[208] *See* Order, *Wilderness Society*, 2023 WL 4784199 (No. 23-1592, ECF No. 42) (4th Cir. July 10, 2023); Order, *Appalachian Voices*, 78 F.4th 71 (No. 23-1384, ECF No. 55, at 2) (4th Cir. July 11, 2023). As is common with orders granting or denying temporary injunctive relief, the court's decisions disposed of the motions for stay without written analysis of the legal issues presented.

[209] Emergency Application to Chief Justice John G. Roberts, Jr. to Vacate the Stays of Agency Authorizations Pending Adjudication of the Petitions for Review, No. 23A35, 2023 WL 4625539 (July 14, 2023). The federal government supported the application, as did the House of Representatives and several Members of Congress as amici curiae. Federal Respondents' Response in Support of Emergency Application to Vacate Stays of Agency Authorization Pending Review (No. 23A35) (Jul. 21, 2023); Brief for the U.S House of Representatives as Amicus Curiae Supporting Applicant, No. 23A35, 2023 WL 4844053 (Jul. 20, 2023); Federal Respondents' Response in Support of Emergency Application to Vacate Stays of Agency Authorization Pending Review, No. 23A35, 2023 WL 4706845 (Jul. 21, 2023); Brief of Current Members of the U.S. Congress, et al, as Amici Curiae Supporting Applicant, No. 23A35, 2023 WL 4706836 (Jul. 19, 2023).

[210] Mountain Valley Pipeline, LLC v. Wilderness Soc'y, 144 S. Ct. 42 (2023) (Mem).

[211] Appalachian Voices v. U.S. Dep't of the Interior, 78 F.4th 71 (4th Cir. 2023).

[212] *Id.* at 76.

prevented the Fourth Circuit from performing its constitutional role of judicial review[213] and that "the separation between the legislative and judicial branches presently lacks fortification."[214] If Section 324 is constitutional, he argued, "Congress will have found the way to adjudicate by legislating for particular cases and for particular litigants, no different than the governmental excesses our Framers sought to avoid."[215] Judge Thacker wrote in her concurrence that "Congress has acted within its legislative authority in enacting Section 324(e)(2)," but "Congress's use of its authority in this manner threatens to disturb the balance of power between co-equal branches of government."[216] Judge Thacker asserted that, currently, "we have no clear guidance from the Supreme Court on where the line between legislative and judicial power lies, especially when Congress acts for the purpose of influencing pending litigation or even going so far as to pick a winner in that pending litigation,"[217] and she called on the Court to provide "a firm limit on Congress's intrusion into the judicial branch."[218]

Considerations for Congress

Cases since *Klein* have limited the reach of that decision. However, the 1872 case remains good law, and *Klein* and its progeny provide some useful guideposts for Congress in fashioning jurisdiction-stripping legislation and measures that target pending litigation. Under *Klein*, Congress cannot "prescribe a rule for the decision of a cause in a particular way."[219] Cases interpreting *Klein* have construed that passage to mean that Congress cannot impede the judiciary's power to decide cases independently—for example, by telling a court how it should rule in a specific case or how to apply existing law to the facts in a given case.[220] Relatedly, under *Plaut*, Congress cannot interfere with the finality of judgments by requiring courts to reopen finally decided lawsuits.[221]

Within those boundaries, Congress has some ability to influence how the judiciary resolves lawsuits without violating the separation of powers. Congress can do this by regulating federal courts' jurisdiction[222] or by enacting substantive statutes that the judiciary must apply to resolve legal disputes.[223] For instance, it does not offend separation-of-powers limitations for Congress to create or amend a law that retroactively applies to lawsuits that began before the new law was enacted.[224] Such new substantive law can target a specific case or set of cases.[225] Additionally, it

[213] *Id.* at 81–82 (Gregory, J. concurring).

[214] *Id.* at 84.

[215] *Id.*

[216] *Id.* (Thacker, J. concurring).

[217] *Id.* at 85.

[218] *Id.*

[219] *See* United States v. Klein, 80 U.S. (1 Wall.) 128, 146 (1872).

[220] *See* Bank Markazi v. Peterson, 136 S. Ct. 13010, 1323 n.17; *id.* at 1330 (Roberts, C.J., dissenting); *Klein*, 80 U.S. at 145–48.

[221] Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 225–32 (1995).

[222] *See* Sheldon v. Sill, 49 U.S. 441, 449 (1850) ("Courts created by statute can have no jurisdiction but such as the statute confers.").

[223] *See, e.g.*, Miller v. French, 530 U.S. 327, 349 (2000).

[224] *See Bank Markazi*, 136 S. Ct. at 1324–26; *Miller*, 530 U.S. at 346–49; *Plaut*, 514 U.S. at 226; Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 437–39 (1992). Retroactive legislation may also raise constitutional issues unrelated to separation of powers. *See* CRS In Focus IF11293, *Retroactive Legislation: A Primer for Congress*, by Joanna R. Lampe (2019).

[225] *Bank Markazi*, 136 S. Ct. at 1327–28; *Plaut*, 514 U.S. at 239 n.9.

appears legislation can be designed in a manner that ensures victory for a particular party so long as the reviewing court may still independently apply the new law to the facts of the case.[226] This principle applies even if the new law effectively predetermines the outcome of a pending lawsuit.[227] As one example, legislation designed to ensure a particular judicial outcome may be accomplished by enacting a procedural rule, such as eliminating a defense such as res judicata.[228]

Recent cases have done relatively little to clarify the outward bounds of Congress's ability to enact legislation that amends the law underlying particular litigation. A majority of the *Patchak* Court concluded that Congress is authorized to limit the reviewability of a class of pending cases, whether through a jurisdiction-stripping statute or a statute that restores the government's immunity from suit.[229] *Patchak* suggests that this principle applies even if Congress legislates in such a way that the government will necessarily prevail in the only lawsuit that the legislation affects.[230] On the other hand, all the Justices on the *Patchak* Court also appear to agree that Congress cannot say, "In *Smith v. Jones*, Smith wins." Ultimately, the lack of a majority opinion in the case means that it provides no binding holding as to when a facially neutral law that functionally ends pending litigation in the favor of one party amounts to a separation-of-powers violation.[231]

Mountain Valley Pipeline likewise provides limited guidance on the scope of Congress's power to limit court jurisdiction in a way that disposes of pending cases. By vacating the Fourth Circuit's stay orders, the Supreme Court may have tacitly indicated that the FRA's jurisdiction-stripping provision is constitutional, but without a written opinion, it is impossible to know the extent to which the Court considered the separation-of-powers question.

On remand in the Mountain Valley Pipeline litigation, the Fourth Circuit accepted the constitutionality of FRA Section 324(e)(1). Both Judge Gregory's and Judge Thacker's concurrences in the Fourth Circuit's dismissal decision raised questions about the scope of Congress's power to strip federal courts of jurisdiction over pending cases and noted that the Supreme Court could provide additional guidance on the issue. Congress may also evaluate those questions, among others, when considering future jurisdictional changes that could affect pending litigation. As a matter of current law, however, the Fourth Circuit's dismissal decision indicates that Congress has significant authority to change substantive law and alter federal court jurisdiction in ways that influence pending cases.

[226] *Bank Markazi*, 136 S. Ct. at 1324–26 (2016).

[227] *Id.* at 1325 ("Congress may indeed direct courts to apply newly enacted, outcome-altering legislation in pending civil cases.").

[228] *See* United States v. Sioux Nation of Indians, 448 U.S. 371, 397–402 (1980).

[229] Patchak v. Zinke, 138 S. Ct. 897, 902–11 (2018); *Id*. at 912–13 (Ginsburg, J., concurring); *Id*. at 913–14 (Sotomayor, J., concurring).

[230] *Patchak*, 138 S. Ct. at 910.

[231] *Compare Patchak*, 138 S. Ct. at 905 (distinguishing the Gun Lake Act from a law that says, "In *Smith v. Jones*, Smith wins," concluding that the Gun Lake Act "changes the law" and thus is permissible under Article III), *and id*. at 911 (Breyer, J., concurring) ("The statutory context makes clear that this is not simply a case in which Congress has said, 'In *Smith v. Jones*, Smith wins.'"), *with id.* at 914 (Roberts, C.J., dissenting) ("Two Terms ago, this Court unanimously agreed that Congress could not pass a law directing that, in the hypothetical case of *Smith v. Jones*, 'Smith wins.' Today the plurality refuses to enforce that limited principle in the face of a very real statute that dictates the disposition of a single pending case.") (internal citations omitted).

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